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IN THE

82-1454

Supreme Court of the United States

No. _____

OCTOBER TERM, 1982

CLAUDE COWARD, NORMA FUNKHOUSER, VIOLA GOLDMAN, ANN HUFF, ROSEMARY HYDES, MARY LEE, VERNER BOOTH, BELVA CREECH, GENEVA WELLS, GEORGE HAMBAUGH, CAROLYN FOSTER, LOUIE WIMP, ANDY JOHNSON, RICHARD KERBERG, GEORGE JONES, BERNARD MILLER, JOE HYMAN, CHARLES LYNCH, JAMES REED, ARTHUR SAMPLES, ROBERTA LA PAILLE, MARVIN FUNKHOUSER, BETTY BROCK, MILLS VINCENT, HELEN CARROLL, ROSALIE BURKS, WILLIAM HIGHFILL, DAVE ROWE, SARA RAPP, KING BLAKELY, RAYMOND KENNEDY, OWEN WOLFE, ELBERT STEVENS, BARDFORD BULLOCK, ERNEST DENSFORD, WILLIAM HESSIG, ELMER KEITH, RALPH MORRISON, VERNIE GOLDMAN, GENEVA WITTINGHILL, JOHN BRUCE, KENNETH SINKHORN, HAROLD BROOKS, ALMA HOUSE, PAULINE HAMBAUGH, VELDA HOUSE AND WALTER BLAKELY,

Petitioners,

VS.

COLGATE-PALMOLIVE COMPANY, EMPLOYEES' RELATIONS COMMITTEE OF COLGATE-PALMOLIVE COMPANY, PLAN ADMINISTRATOR OF THE COLGATE-PALMOLIVE EMPLOYEES' RETIREMENT INCOME PLAN, et al,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

Whether or not hourly employees who are members of respondent Retirement Income Benefit Plan are entitled to all benefits of the plan which came into being during the time of their full participation in the plan which participation was never subsequently interrupted.

Whether or not the respondent Retirement Income Benefit Plan is a security within the meaning of the Securities Act of 1933, §17(a), 15 U.S.C.§77g(a) and the Securities Exchange Act of 1934, §10(b), 15 U.S.C. §77j(b), and Rule 10b-5 of the Securities and Exchange Commission.

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QUESTIONS PRESENTED

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Whether or not the respondent Retirement Income Benefit Plan is a security within the meaning of the Securities Act of 1933, §17(a), 15 U.S.C. §77g(a) and the Securities Exchange Act of 1934, §10(b), 15 U.S.C. §77j(b), and Rule 10b-5 of the Securities and Exchange Commission.

IMPORTANCE OF QUESTIONS PRESENTED

The questions presented carry with them the novel question of the appropriate rights of hourly employees to retirement benefits, and the extent to which such fully accrued vested benefits are in fact protected by the terms of the Employees' Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1132 *et. seq.*, and the extent to which such Act is a jurisdictional basis for retirement plan members to secure a declaration of both their accrued retirement benefits and future retirement credits when they are placed in question.

The first question presented is significant because the answer to it is necessary in order to prevent arbitrary reduction of retirement benefits accrued to hourly employees by employers.

Petitioners seek review of this case by this Court because of their belief that it poses a significant question, the answer to which is vital in order that there continue to be an

orderly processing of cases like this through and by the trial courts of this land. (This Court's appellate Rule 17 1 A and C).

DECISIONS BELOW

On the 21st day of January, 1981, the district court granted summary judgment adverse to petitioners. (App. A1-8). There are fifty-three (53) petitioners herein. The district court granted summary judgment and dismissed the claims of thirty-nine (39) petitioners on the grounds that it did not have jurisdiction over the claims under the Employees' Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1132 *et. seq.*

The district court granted summary judgment against the remaining fourteen (14) petitioners on the grounds that *Bowe vs. Colgate*, 489 F.2d 896 (1973), and *Stevens, et al. vs. Colgate*, No. 75-1929 (7th Cir., 2-17-77)—both employment discrimination cases—both of which were decided before the rights asserted in the instant case came into existence, were a *res judicata* bar to these claims.

On August 16, 1982, the Court of Appeals affirmed the decision of the district court (App. A9-22), except that the Court of Appeals decided that the district court did have jurisdiction over the claims of the group of fourteen (14) petitioners under the Employees' Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1132 *et. seq.*

On November 10, 1982, the Court of Appeals denied rehearing in this case. (App. A23).

JURISDICTION

Petitioners brought this suit under the Employees' Retirement Income Security Act (ERISA), 29 U.S.C. §1132 *et. seq.*, seeking 1) a declaration of their entitlement to credit for accrued years of service in the respondent Retirement Income Benefit Plan, and 2) a declaration of

their future rights under the then current terms of said retirement income plan, by virtue of their being full and continuous participants in the retirement plan. All petitioners are long term employees with respondent. In some instances they have forty (40) years of service.

The district court decided that it did not have jurisdiction of this case under the Securities Act of 1933, §17(a), 15 U.S.C. §77g(a) and the Securities Exchange Act of 1934, §10(b), 15 U.S.C. §77j(b), and Rule 10b-5 of the Securities and Exchange Commission. (App. A1-8). The Court of Appeals affirmed. (App. A9-22). The holding in this case is contrary to the ruling precedent of the Supreme Court.

STATEMENT OF THE FACTS

Petitioners are all full-time hourly employees of respondent's Jeffersonville, Indiana, facility. All petitioners are members of respondent's Retirement Income Benefit Plan. Likewise, all petitioners are members of the International Chemical Workers Union, Local 15. That union is the hourly employees' bargaining agent at the respondent's Jeffersonville, Indiana, plant.

Respondent's Retirement Income Benefit Plan was funded by financial contributions from both the employees and the employer from its inception on December 31, 1943, until December 31, 1976. After the latter date, direct financial contributions were not received from the employees.

In 1971, 1974 and 1977 the terms of the employees' benefits provided by the retirement plan were improved through collective bargaining between the International Chemical Workers Union, Local 15, and the respondent.

All petitioners were members of both respondent's retirement plan and the Chemical Workers Union at the time that the improved employees' retirement benefits

were negotiated in 1971, 1974 and 1977. Such membership in and participation in the retirement plan by petitioners have been continuous. The improved benefits were negotiated on behalf of all Colgate employees who were then members of the retirement plan.

Nevertheless, sometime after the third quarter of 1976, petitioners herein learned for the first time that the respondent was denying petitioners' rights to the improved employees' retirement benefits that were negotiated in 1971, 1974 and the benefits which became effective in 1977. The petitioners filed suit in the United States District Court for the Southern District of Indiana on the 30th day of September, 1977.

The respondent based its denial of said improved retirement income benefits to thirty-nine (39) of the petitioners on the grounds that they had previously (during the late 50's and early 60's), withdrawn from the plan. After the withdrawals, all petitioners re-enrolled in the plan during the 50's and 60's and were full participating members of the plan and the union (Chemical Workers, Local 15), at the time that the improved retirement benefits became effective, and at the time that the Employees' Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1132 *et. seq.*, became effective.

With respect to the remaining fourteen (14) petitioners, respondent contended that they were not entitled to the improved benefits on the theory that said petitioners had, in the past, suffered extended layoffs which resulted in the loss of their status as respondent's employees. This contention is not a bar to the claims of these petitioners, moreover, it is factually incorrect. Further, the fourteen (14) petitioners were all full-time employees of respondent and participants in the retirement plan and union at the time that the improved benefits because effective.

ARGUMENT REGARDING QUESTIONS PRESENTED

The Group of Thirty-Nine (39) Petitioners

The group of thirty-nine (39) petitioners deserve, under the Employees' Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1132 *et. seq.*, to have their entitlement to accrued retirement benefits decided, and to have their entitlement to future retirement benefits under the plan clarified. The trial court erred by flatly refusing to grant petitioners a hearing and state a declaratory judgment as to petitioners' rights in the future to benefits under the retirement plan. Instead, the trial court issued a summary judgment adverse to petitioners, thus denying these long term, and now older employees, retirement benefits for which they had worked for years.

The trial court reasoned that these petitioners had factually "waived" their right to these improved benefits long before such benefits came into existence, and long before petitioners could have known of the future existence of said improved retirement benefits. This, by the trial court's notion, was done as the petitioners signed a card during the 50's and 60's withdrawing from the plan briefly, and acknowledging that they understood that they had a right to then continue their participation in the plan. That acknowledgement could not exterminate retirement benefits which came into existence for the first time in the 70's. Moreover, an equitable contradiction is that persons who became respondent's employees for the first time after all petitioners had re-enrolled in the retirement plan, have been granted these improved retirement benefits which came into existence during the 1970's. Petitioners, who are all long term employees of respondent, are entitled to the improved retirement benefits. The trial court did have jurisdiction over these claims under ERISA, it erred by holding to the contrary, and the Court of Appeals erred by affirming.

Therefore, this Court should grant this petition for writ of certiorari.

Fourteen (14) Remaining Petitioners

With respect to the remaining fourteen (14) petitioners, the lower courts erred by holding their claims to have been barred by the doctrine of *res judicata* under *Bowe vs. Colgate*, 489 F.2d 896 (1973), and *Stevens, et al. vs. Colgate*, No. 75-1920 (7th Cir., 2-17-77). The determinations were made in both *Bowe* and *Stevens* before the claims involved in this case came into existence.

The issues raised by petitioners' Complaint were never litigated in *Bowe*, and the benefits claimed by petitioners came into existence only after *Bowe* was decided. Moreover, the trial court's decision is based upon the incorrect and un-tried assumed factual premise that, "these petitioners lost their status as employees by reason of a long term layoff." The assumption is inaccurate and should have been tested by trial. None of the fourteen (14) petitioners were ever on layoff status for a period of up to twenty-four (24) months. Respondent's official (Clayton O. McIntyre), stated as follows in his deposition:

> "Q. When is a break in employment considered to have occurred for layoff purposes?
>
> A. As I recall, its 24 months..."
> (Deposition of Clayton O. McIntyre, pgs. 83-84)

The writ of certiorari of these fourteen (14) petitioners should be granted.

Lastly, the holding in this case is contrary to the ruling precedent of the Supreme Court as to whether or not the retirement plan involved herein is a security so as to give the trial court jurisdiction over this case under the Securities Act of 1933 §17(a), 15 U.S.C. §77g(a) and the Securities Exchange Act of 1934, §10(b), 15 U.S.C. §77j(b), and Rule 10b-5 of the Securities and Exchange Commission. The 7th Circuit has held in this case that the retirement plan involved is not a security. In the cases of *International Brotherhood of Teamsters v. Daniel*, 493 U.S.

551, 558 (1979), *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975), and *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 852 (1975), it was held that the retirement plan such as the one involved in this case is a security within the meaning of the above cited statutes and rules.

CONCLUSION

Wherefore, for each of the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted.

/s/ JOHN O. MOSS

JOHN O. MOSS,
Attorney for Petitioners

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

CLAUDE COWARD, ET AL.	)	
	)	
VS.	)	NA 77-105-C
	)	
COLGATE-PALMOLIVE COMPANY, ET AL.	)	

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT.

This cause comes before the Court upon the motion of the defendant for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure. Whereupon the Court having heard oral argument on said motion and having considered the affidavits, depositions and memoranda filed in support of and in opposition thereto, and now being duly advised in the premises, hereby finds that there is no genuine issue as to material facts necessary for making a determination and that the defendant is properly entitled to summary judgment as a matter of law.

Said motion for summary judgment is directed to the original complaint and the Court hereby DENIES amendment to said complaint.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the defendant's motion for summary judgment be, and the same is hereby, GRANTED.

DATED this 21st day of January, 1981.

/s/ JAMES E. NOLAND

JAMES E. NOLAND,
U.S. District Judge

MEMORANDUM ENTRY

This cause came before the Court upon the motion of the defendant for summary judgment and the response thereto of the plaintiffs. Also available to the Court were certain depositions taken by the parties herein. A hearing was held and oral argument was presented in connection with the motion for summary judgment. A brief review of the facts giving rise to this controversy now follows.

The controversy between the parties centers around the Colgate-Palmolive Employees Retirement Income Plan (hereinafter referred to as ERIP or Plan) which was initiated as of December 31, 1943. The original Plan was funded through an insurance contract with Equitable Life Assurance Society and various requirements as to employee age and years of service were imposed before employees were eligible to participate in said Plan.

Various changes were made in eligibility requirements from time to time based on negotiations between Colgate and Local 15 of the International Chemical Workers Union.

The 53 plaintiffs in this action are seeking to receover past pension credits which were lost when 39 of them voluntarily withdrew from the Plan or when the remainder lost employee status and seniority as a result of an extended layoff. Nearly all of the voluntary withdrawls from the Pension Plan occurred at least ten years prior to the filing of this action. Over 12 years has enused since the seniority of certain of the plaintiffs was lost because of extended layoffs. Therefore, the matters complained of by plaintiffs occurred long before the passage of the Employees Retirement Income Security Act of 1974 (ERISA) 29 U.S.C. §1132.

After October 1, 1954, any changes in the Plan had to first be negotiated between the Local Union and Colgate. The Plan was a contributory Plan from its inception until January 1, 1977, when the Plan became non-contributory

and Colgate assumed the full financial responsibility for contributions to the plan. Coverage for pension benefits, however, was still based upon continuous service and periods of time prior to withdrawal from the Plan continue to be excluded.

The plaintiffs set forth their contentions in a complaint encompassing five counts. Count I contends that the provisions of the Plan should extend full coverage based on years of service regardless of any actions which the plaintiffs have taken or any events wnich have occurred which would disqualify them from coverage based on total years of service.

Count II attempts to invoke the Military Selective Service Act on behalf of certain of the plaintiffs who were in military service to cause them to be given total coverage.

Court III alleges that the administration of the Plan was in violation of the Securities Act of 1933, §17(a), 15 U.S.C. §77q(a).

Count IV alleges administration of the Plan in violation of the Securities Exchange Act of 1934 as set forth in §10(b), 15 U.S.C. §77j(b) and Rule 10(b)-5.

Count V alleges a claim for coverage based on total years of service, and based simply upon alleged equitable considerations which would give them entitlement to complete coverage.

The defendant has opposed the plaintiff's contentions in its motion for summary judgment, pointing out that there is no real dispute as to the underlying facts and that the plaintiffs have no legal support whatsoever for any of their said contentions.

To summarize, defendant contends that the plaintiffs by voluntary withdrawal from the Plan or by loss of seniority became legally separated from the Plan for a period of time for which they are not now entitled to coverage; and defendants further contend that there is no basis for going

back in time to extend Plan coverage and bestow Plan benefits for periods prior to the date of reinstatement or requalification under the Plan. Further, defendant sets forth considerations both factual and legal which it claims negates any of the plaintiffs' claims as follows:

1. The 39 plaintiffs voluntarily withdrew from the Plan and knowingly executed waiver cards thereby relinquishing all rights to participation in the Plan. Thereafter said plaintiffs received lump sum payments in return for their previous contributions. After withdrawal, several of the plaintiffs reenrolled in the Plan when such an opportunity was extended under regular provisions, however, renewed coverage was on the basis of future service only.

2. The claims of the remaining 14 plaintiffs are invalid because said plaintiffs were discontinued under the provisions of the Plan as the result of extended layoffs. The seniority claims of said 14 plaintiffs were definitively adjudicated in this court involving these same parties, to-wit: *Bowe, et al v. Colgate-Palmolive Company, et al.*, No. NA 66-C-20, and *Stephens, et al v. Colgate-Palmolive Company, et al.*, No. NA 72-C-43. Said decisions which were affirmed by the Seventh Circuit Court of Appeals are therefore res judicata as to the seniority status and thus pension coverage of said plaintiffs.

3. Any claim under the Military Selective Service Act on behalf of 11 of the plaintiffs who had military service are invalid either on the basis of a 15 year statute of limitations under Indiana law or on account of replacement of said Act by the Viet Nam Era Veterans Readjustment Assistance Act of 1974. Furthermore, each of the plaintiffs was given credit for time in the military service under the provisions of the Plan.

4. No claim for relief is stated by plaintiffs under the provisions of the Employees Retirement Income Security Act of 1974 since it does not apply or have effect during the periods involved in this complaint.

5. Neither of the securities acts referred to by the plaintiffs has any application whatsoever to the conditions of coverage in the operation of this Plan.

6. The plaintiffs have no case for equitable relief whatsoever based on the contract provisions of the Plan and further based on the plaintiffs having been guilty of laches and being subject to estoppel and accord and satisfaction.

DISCUSSION

This case then presents itself as a simple matter of coverage under the Plan and whether the 39 plaintiffs who made voluntary withdrawal from the Plan and the 14 plaintiffs who involuntarily lost coverage because of layoffs and loss of seniority can now regain total coverage.

Addressing the matter of voluntary withdrawal by the 39 plaintiffs, we find that each of them signed a "waiver card" which had set forth above their signature the following statements:

> "I hereby certify that: I have been given an opportunity to participate in the Employees Contributory Group Annuity Plan with the Equitable Life Assurance Society of the United States. The benefits of the Plan have been thoroughly explained to me. I understand fully the benefits explained to me under the Plan and *I decline to participate.*" (Our emphasis)

Those of the plaintiffs who had made contributions but signed the waiver card signifying their withdrawal were thereupon refunded monies to which they were entitled based on contributions to said Plan.

This Court now, as in the past, continues to hold that persons who signify knowledgeable action by affixing their signatures may not thereafter avoid the consequences thereof. The facts of this case show, as set forth in the deposition of Ralston Friend, that in every case of the 39 plaintiffs who voluntarily withdrew from the Plan, Friend

had read to them waiver cards, explained to them what they were forfeiting before they signed the card in his presence and then wrote in his own hand a note describing said withdrawal which was typed on the back of the waiver card by his secretary. The 39 plaintiffs who voluntarily withdrew from the Plan were refunded the amount of their contributions. All of these voluntary withdrawals from the Plan occurred prior to January 1, 1968. Following that date, amendments to the Plan were negotiated between the company and the union which required that all employees henceforth must maintain their membership status in the Plan while employed by Colgate.

For the 39 plaintiffs to contend failure of understanding of the waiver or misrepresentation by Colgate is without force and effect to nullify their own voluntary actions.

Turning to the 14 plaintiffs whose loss of seniority discontinued them from the Plan, we face a somewhat more complex problem since they are contending for restoration of all rights in the ERIP prior to their loss of seniority. Within this group are seven female plaintiffs who were discontinued from the Plan as the result of an extended layoff. Both of these groups were involved in legal actions which adjudicated their seniority for all purposes.[1]

Therefore, this litigation established the seniority dates of each of these 14 plaintiffs. The 7th Circuit Court of

[1]Plaintiffs by name: Harold Brooks, William Highfill, John J. Hyman, Charles E. Lynch, Bernard J. Miller, James R. Reed and Elbert Stevens brought an action which adjudicated their seniority and pension benefits finding that they had not been wrongfully treated by Colgate. This case was *Stevens, et al v. Colgate, et al*, NA 72-C-43. In addition, the seven female plaintiffs, Mary Adams, Eva Hall, Pauline Hambaugh, Alma House, Velda House, Roberta LaPaille and Geneva Whitinghill were also engaged in a sex discrimination action against Colgate. The ultimate decision in this case adjusting their seniority date for all purposes and therefore denied them eligibility to enter the Plan prior to their present date of restoration of all rights in the ERIP. See *Bowe, et al v. Colgate, et al, NA66-C-20.*

Appeals sustained the finding of the District Court that there was no merit to the claim of any of the plaintiffs to seniority and benefits pre-dating their current existing seniority date.

Defendant points out that all of this group of plaintiffs except Stevens and LaPaille are now currently members of the Plan with their Plan service credited to the date of their most recent entry into the Plan. (The plaintiffs, Stevens and LaPaille retired before the commencement of this action). Colgate has attached to its motion for summary judgment the unpublished opinion of the 7th Circuit in *Stevens, et al v. Colgate, et al*, (see footnote). That opinion and the opinion of the Court of Appeals in *Bowe v. Colgate*, 489 F.2d 896, at 901 (1973) make it exceedingly clear that the seniority dates of each of the 14 plaintiffs has been established by court decision which is now *res judicata* herein.

STATUTES CITED BY PLAINTIFFS NOT APPLICABLE

It is further the opinion of the Court based upon the undisputed facts in this case that plaintiffs have not stated a cause of action either under the Securities Act of 1933 or the Securities Exchange Act of 1934, including Section 10(b) and Rule 10(b)-5. *Intl. Brotherhood of Teamsters, et al v. John Daniel*, 99 S.Ct. 790 (1979). Clearly there is no fraud in this case in view of the extensive efforts of Colgate through its supervisors to persuade each and every employee to maintain their participation in the Plan rather than exercise an option to withdraw and receive back their cash contributions.

Clearly the Military Selective Service Act has no effect whatsoever on the eleven plaintiffs who were members of the armed forces since none of these plaintiffs were prejudiced in any manner by virtue of time spent in the military service.

Although the Indiana statute of limitations might well be

applicable, this Court does not need to discuss whether the claims of any of the plaintiffs are barred by the statute of limitations since this decision is being made on other grounds.

The Court also holds that the matters in controversy are matters of contract and the Court finds no claim in equity which would rise above the contractual provisions that are to be applied in connection with ERIP.

The Court therefore concludes that for all the reasons stated above, there are no genuine issues as to material facts necessary for the Court to grant a motion for summary judgment in behalf of the defendant as a matter of law. Therefore the defendant's motion for summary judgment is hereby granted and a judgment in behalf of the defendant Colgate will now be entered accordingly.

DATED this 21st day of January, 1981.

/s/ JAMES E. NOLAND, *Judge*

JAMES E. NOLAND,
U.S. District Judge

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

No. 81-1305
CLAUDE COWARD, et al.,

Plaintiffs-Appellants,

v.

COLGATE-PALMOLIVE CO., et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana,
New Albany Division. No. 77-105-C
James E. Noland, *Judge.*

ARGUED DECEMBER 10, 1981—DECIDED AUGUST 16, 1982

Before SWYGERT, *Senior Circuit Judge*, and CUDAHY and POSNER, *Circuit Judges.*

SWYGERT, *Senior Circuit Judge.* Plaintiffs-appellants challenge the loss of past pension benefit credits claiming violation of the (1) Employees' Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§1132, *et seq.*, (2) Securities Act of 1933, §17(a), 15 U.S.C. §77g(a), (3) Securities Exchange Act of 1934, §10(b), 15 U.S.C. §77j(b), and Rule 10b-5 of the Securities and Exchange Commission, and (4) the Military Selective Service Act, 50 U.S.C. §459(b). Before analyzing the legal issues, we review the salient facts.

I

This suit centers around an employee retirement pension plan. The original plan was funded through an annuity contract with the Equitable Life Assurance Society. Eligibility requirements as to employees' age and years of service were imposed for participation in the plan. These requirements were changed from time to time as a result of collective bargaining negotiations between Colgate-Palmolive Company and Local 15 of the International Chemical Workers Union. In 1971, these requirements were abolished and pension credits were recognized back to the date of hire for employees who had participated in the plan continuously since the time they were first eligible.

From its inception on December 31, 1943 until January 1, 1977, the pension plan was voluntary, requiring contributions from the participating employees and the company. The caluation of pension benefits was based on the amounts of contributions credited to an employee for the time he was a participant in the plan. In 1977, the plan became non-contributory and the company assumed the full financial responsibility for contributions to the plan. Coverage for pension benefits, however, was at all times based upon continuous service, excluding any period of nonparticipation while eligible or any period prior to withdrawal.

This action was instituted by plaintiffs to recover past pension benefit credits they were allegedly entitled to after the pension plan was amended to grant retroactive credits to employees who had participated continuously in the plan. Some of the plaintiffs seek to recover past pension benefit credits which the company contends were waived when the plaintiffs voluntarily withdrew from the plan. Another group of plaintiffs seeks to recover past pension credits which the company asserts were lost, pursuant to the plan's provisions, when each of the plaintiffs lost his or her employee and seniority status as a result of an extended

layoff. Plaintiffs appeal from the district court's order granting summary judgment for the company.

II

ERISA was enacted by Congress to protect the pension rights of employees by establishing minimum standards for the regulation of private retirement plans. 29 U.S.C. §1001 provides in pertinent part:

* * *

> (c) It is hereby...declared to be the policy of this Act to protect...the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service.

To effectuate this policy, Congress prescribed minimum vesting standards and limited the circumstances for which vested rights can be divested to: death of the employee; suspension of benefits upon particular types of reemployment; certain plan amendments approved by the Secretary of Labor; and the withdrawal of benefits derived from employee contributions. 29 U.S.C. §1053(a)(3). *See Winer v. Edison Bros. Stores Pension Plan*, 593 F.2d 307, 311 (8th Cir. 1979).

A

We consider first the claims of the thirty-nine plaintiffs who voluntarily withdrew from the plan. None of them had vested rights in the plan before their withdrawals. All withdrew prior to January 1, 1968, years before the enactment of ERISA, by signing waiver cards.[1] They

[1]Each of these plaintiffs signed a waiver card which set forth above their signature the following:

WAIVER CARD Cet. # _____

I HEREBY CERTIFY THAT: Withdrew from plan at his request on ____, ____ to obtain money for payment of debts.

(Footnote continued on following page)

thereupon received refunds equal to the amounts of their contributions to the plan. It is uncontroverted that, in every case, before plaintiffs withdrew from the plan, an official at Colgate-Palmolive read the waiver card to each of them, explained what they were forfeiting before they signed the cards in his presence, and wrote a note describing each withdrawal which was typed on the back of each waiver card. After withdrawal from the plan, plaintiffs at various times reenrolled, but calculation of future pension benefits was based on future service only.

Plaintiffs attempt to bring the issue of the sufficiency and extent of their waivers under the provisions of ERISA by arguing that their cause of action arose in 1976, after ERISA was enacted, when they discovered that the company was denying them their past pension benefit credits. ERISA expressly provides that, as to plaintiffs' claims under 29 U.S.C. §1132, its preemption of state laws relating to any employee pension benefit plan "shall not apply with respect to any cause of action which arose, *or any act or omission* which occurred, before January 1, 1975."[2] 29 U.S.C. §1144(b)(1) (emphasis added). A party cannot rely on pre-ERISA conduct to escape application of ERISA if the critical acts serving as the basis for the claim

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I HAVE BEEN GIVEN AN OPPROTUNITY TO PARTICIPATE IN THE EMPLOYEE'S CONTRIBUTORY GROUP ANNUITY PLAN WITH THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES. THE BENEFITS OF THE PLAN HAVE BEEN THOROUGHLY EXPLAINED TO ME. I UNDERSTAND FULLY THE BENEFITS AVAILABLE TO ME UNDER THE PLAN AND I DECLINE TO PARTICIPATE.

[2] 29 U.S.C. §1132(a)(1)(B) provides:

(a) A civil action may be brought...

(c) by a participant or beneficiary...

* * *

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan or to clarify his rights to future benefits under the terms of the plan.

(Footnote continued on following page)

occurred after ERISA went into effect. *Winer, supra.* Similarly, plaintiffs cannot rely on the fact that they allegedly discovered the effect of their waivers after ERISA, if the critical acts constituting their effective waivers occurred before ERISA came into effect. We do not need to decide whether plaintiffs' cause of action arose at the time plaintiffs contend they became aware of the effect of their waivers because we find that plaintiffs' actions in signing the waiver cards and accepting amounts equivalent to their contributions to the plan constitute "act[s]...which occurred, before January 1, 1975" within the meaning of 29 U.S.C. §1144(b)(1).[3] *Bacon v. Wong*, 445 F. Supp. 1189, 1192 (N.D. Ca. 1978).

The critical question is whether plaintiffs' conduct at the time of the alleged waiver was voluntary, intelligible, and meaningful so as to constitute an effective waiver.[4] If, in fact, the waivers of pension benefit credits were ineffective,

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29 U.S.C. §1144 provides in pertinent part:

(a) Except as provided in subsection (b) of this Section, the provision of this subchapter [subchapter 1, sections 1001 through 1144, which includes the civil enforcement provisions under which appellants proceeded in the district court]...shall supersede any and all State laws insofar as they may not or hereafter relate to any employee benefit plan...

(b)(1) The section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

[3]"The phrase 'act or omission' has been said to 'refer to those significant facts which give rise to a claim but which fall short of establishing a cause of action,' *Winer v. Edison Brothers Stores Pension Plan*, 593 F.2d 307, 313 (8th Cir. 1979)....The clear practical import of the act or omission clause is to prevent past conduct of pension plan fiduciaries and contributors from being judged retroactively under the standards established by ERISA simply because the conduct generates consequences subsequent to the ERISA effective date that give rise to what is, technically, an independent 'cause of action'." *Quinn v. Country Club Soda Co.*, 639 F.2d 838, 840-841 (1st Cir. 1981).

[4]*City of Evansville v. Follis*, 315 N.E.2d 724, 728 (Ind. Ct. App. 1974); *Conner v. Fisher*, 202 N.E.2d 572, 575 (Ind. Ct. App. 1964); *Shearson Hayden Stone, Inc. v. Leach*, 583 F.2d 367, 370 (7th Cir. 1978). While the

(Footnote continued on following page)

then ERISA applies not because plaintiffs became aware of the consequences of their pre-ERISA conduct after ERISA's effective date, but because the pension credits were not effectively waived prior to the time that ERISA came into force.

A careful examination of the record satisfies us that the district court was correct in concluding that plaintiffs' conduct in signing the waiver cards, and accepting amounts equivalent to their contributions to the plan, constituted effective waivers of their pension benefit credits. We reject plaintiffs' contention that the company's continuous act of denying them pension benefit credits is a continuing breach of duty which brings their claim within the ambit of ERISA, since this construction would in effect read the exception of section 1144(b)(1) out of the statute. *Martin v. Bankers Trust Co.*, 565 F.2d 1276, 1278-79 (4th Cir. 1977). We hold that plaintiffs cannot assert jurisdiction under ERISA as to their claim pertaining to pension credits that they waived prior to ERISA's effective date.

Because the district court did not have jurisdiction over the claims of the thirty-nine plaintiffs who withdrew from the plan, the court should not have granted summary judgment for defendants. Although, as the First Circuit has noted, "disposition of cases such as this one fall[s] within a 'gray area' where dismissal might be termed either 'jurisdictional' or 'on the merits,'" *Quinn*, 639 F.2d at 841 n.3, we believe that it is the better practice to dismiss cases such as this one rather than dispose of them on motions for summary judgment. We therefore vacate the judgment of the district court as to the thirty-nine plaintiffs and remand the case with instructions to dismiss the complaint for lack of jurisdiction.

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finding of a "waiver" depends on applicable state law, the question of whether a "waiver" is an "act" within 29 U.S.C. §1144 (b)(1) is one of federal law. *Cf.* Part B where we discuss why actions constituting termination from employment are not "acts" within 29 U.S.C. §1144(b)(1).

B

Fourteen plaintiffs contend that they are entitled to pension credits for the periods of time prior to their layoff. Any employee who was laid off for longer than twelve months lost his status as a Colgate-Palmolive employee. A notice of discontinuance from the plan was prepared, and the employee had the option of receiving the amount of his contributions or remaining in the plan and receiving benefits in the form of an annuity based on the employee's contributions. All the plaintiffs in this case who were laid off elected the first alternative.

The company does not contradict plaintiffs' assertion that their application for pension credits was denied in 1976, subsequent to ERISA's effective date. The company contends, however, that this court lacks subject-matter jurisdiction because the events in question occurred prior to ERISA's effective date. We disagree.

The company argues that the critical "act" for purposes of ERISA, 29 U.S.C. §1144, was the employees' termination from the plan as a result of their extended layoffs. We reject this analysis because it would place too heavy a burden on employees who participated in pension plans by requiring them to know what the plan provided in the event of an extended layoff or risk losing their cause of action. *See Winer*, 593 F.2d at 312. We believe that such a result is inconsistent with the purposes of ERISA. "Congress could not have meant that if *any* act or omission relevant to the cause of action occurred prior to January 1, 1975, state law would control. Such an interpretation would be inimical to the Congressional attempt to extend the protections of ERISA as soon as practicable." *Id.* at 313. We hold that the critical act for purposes of ERISA was not the layoffs, but was the denial of plaintiffs' applications for pension benefit credits; therefore, we have jurisdiction of the claims of those employees who lost their pension credits as a result of layoffs.

On the merits, decisions in *Bowe v. Colgate-Palmolive*, 489 F.2d 896 (7th Cir. 1973); *Stevens v. Colgate-Palmolive*, No. 75-1929 (7th Cir. Feb. 17, 1977) unpublished order), involving the same parties to the claim under review, are *res judicata* as to the issue of the effect of plaintiffs' extended layoffs on their pension benefit credits. Plaintiffs argue that this court's two previous decisions dealt with plaintiffs' seniority, while the present claim deals with pension benefit credits. The *res judicata* effect of the previous cases does not depend on the label placed by the parties on the cause of action. The essential fact is that the pension benefit credits claimed by plaintiffs in the instant case are calculated by determining the length of employment, *i.e.*, seniority, which we expressly and conclusively determined in the two previous cases.[5] Since our previous holdings and the relief granted in the previous cases are *res judicata* on the merits of plaintiffs' entitlement to pension benefit credits for the period of employment prior to their layoffs, plaintiffs may not relitigate this claim. Therefore, the district court properly granted summary judgment against this group of plaintiffs.

C

Plaintiffs who waived their benefit credits and those who lost their credit as a result of extended layoffs now claim that they are entitled to retroactive benefit credits based on amendments to the retirement plan which came into effect on January 1, 1977. Plaintiffs argue that the amendments provided that the number of years service used in

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[5]In the two previous cases, these same plaintiffs requested that they be granted "the accumulated back seniority they have lost, with all benefits, including but not limited to, back pay, increase in remuneration, vacation rights, sick leave *and pension rights* to which they would have been entitled had they not been wrongfully classified, denied recall or laid off on the basis of sex." *Stevens supra*, at p. 2 (emphasis added).

computing retirement benefits was to be determined by calculating from the date of hire of each participant, without reference to the terms and conditions of the retirement income plan which was in effect on the date of hire of such employee.

Plaintiffs' claim sufficiently asserts this court's subject-matter jurisdiction under ERISA. "Jurisdiction... is not defeated... by the possibility that the averments might fail to state a cause of action on which [appellants] could actually recover." *Bell v. Hood*, 327 U.S. 678, 682 (1946).

Although amendments to a pension plan can explicitly provide for the retroactive application of favorable terms for individuals who had ceased their employment, *see Tucci v. Edgewood Country Club*, 459 F. Supp. 940 (W.D. Penn. 1978), or who had previously lost credited service, we do not believe that the provisions of the amended plan at issue in this case support such a construction. The plan has always provided that any period prior to withdrawal is not recognized in calculating pension benefit credits. In 1974, amendments to the plan granted retroactive credit to the date of hire *only* to those employees who had been continuous participants in the plan from the date of their eligibility. Plaintiffs, by relinquishing their rights to participate and then later rejoining the plan, were limited by the plan's express terms to credit from the date of their rejoining the plan.[6] Article X-111-¶8 of the 1977 plan supports the conclusion that the amendments were not intended to provide plaintiffs with retroactive benefit credits. That provision states that

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[6]Section 203(b)(1)(F) of ERISA provides that:

"(b)(1) In computing the period of Service under the plan for purposes of determining the non-forfeitable percentage under subsection (a)(2) of this section, all of an employee's years of service with the employer or employers maintaining the plan shall be taken into account, except that the following may be disregarded:

* * *

(Footnote continued on following page)

> [f]or a Member who will have his service connected under Section 4 of this Article [dealing with break in service for the purpose of vesting] and who withdrew the Benefit Attributed to the Member's Contributions to the Plan as outlined in Section 1(a), he may upon subsequent reemployment and enrollment in the plan buy back the amount of such accrued benefit attributed to his contributions to the plan. In order to buy back the Benefit Attributed to the Member's Contributions a Member must return to the Plan the amount withdrawn plus interest....

Plaintiffs have not presented evidence to raise a genuine issue of fact as to the sole material issue of the proper interpretation of the terms of the amendments to the plan. Consequently, the grant of summary judgment was proper on the claim for retroactive benefit credits.

III

Plaintiffs' claim of violations of the Securities Acts relates solely to the contributory-voluntary pension plan in existence prior to January 1, 1977, because as to the non-contributory, compulsory pension plan in existence since 1977, it is clear that the Securities Acts do not apply. *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551 (1979).

Plaintiffs' complaint alleges that the company violated the Securities Act of 1933, 15 U.S.C. §77g(a), the Securities Exchange Act of 1934, 15 U.S.C. §77j(b), and Rule 10b-5 (17 C.F.R. §240.10(b)-5). In the complaint, plaintiffs assert that the defendants never disclosed to plaintiffs, facts from which a reasonable person could infer the actual probability that plaintiffs would not, in fact, receive

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(F) Years of service before this part first applies to the plan [September 2, 1974] if such service would have been disregarded under the rules of the plan with regard to breaks in service, as in effect on the applicable date."

retirement income benefits from the Plan; the defendants never disclosed facts to the plaintiffs from which plaintiffs could intelligently appraise the risk that they were undertaking of ever receiving retirement income benefits in the future. [And] defendants have not, including the various times at which the Plan was offered to the several plaintiffs, disclosed to plaintiffs and each of them, the circumstances under which the plaintiffs could be deprived of retirement income benefits under the Plan." The district court granted summary judgment, finding that there was no genuine issue of fact as to the alleged fraud, "in view of the extensive efforts of Colgate through its supervisors to persuade each and every employee to maintain their participation in the plan rather than exercise an option to withdraw and receive back their cash contributions."

The parties disagree about whether plaintiffs had pleaded the necessary elements of scienter and specification of fraud. We do not reach this question, because we believe that the quintessential defect in appellant's claim of a violation of the Securities Acts lies in the fact that the pension plan at issue in this case does not constitute a security within the meaning of the Securities Acts. Section 2(1) of the Securities Act of 1933, *as amended*, 15 U.S.C. §77b(1), defines a "security" as "any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, *investment contract*, voting-trust certificate, certificate of deposit for a security, fractional individual interest in oil, gas, or other mineral rights, or in general, any interest or instrument commonly known as a 'security,' or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right

to subscribe to or purchase, any of the foregoing."[7] (emphasis added). The only term in this definition of "security" that could arguably characterize an interest in the pension plan is "investment contract." The Supreme Court has expressly stated that "[t]o determine whether a particular financial relationship constitutes an investment contract, '[t]he test is whether the scheme involves an investment of money in a common enterprise with [reasonable expectation of] profits to come solely from the efforts of others.' *Howey*, 328 U.S. at 301. This test is to be applied in light of 'the substance—the economic realities of the transaction—rather than the names that may have been employed by the parties.' *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 851-852, 95 S.Ct. 2051, 2060, 44 L.Ed. 2d 621 (1975)." *Daniel*, 439 U.S. at 588.

Applying the Supreme Court's test to Colgate-Palmolive's pension plan leads us to conclude that it cannot be considered a "security" as that word is defined in the Acts. The plan provides that the retirement benefits to which a participant is entitled substantially exceed his contributions and are not dependent on any profits that might be generated by the investment of the plan's funds.[8]

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[7]The definition of a "security" in section 3(a)(10) of the Securities Exchange Act of 1934, 15 U.S.C. §77c(a)10, is virtually identical and, for the purposes of this case, the coverage of the two Acts may be regarded as the same. *See Daniel*, 439 U.S. at 556 n. 7.

[8]Although there were minor variations in the percentages and years used, as a result of the various amendments to the plan, participants in the plan were guaranteed retirement benefits based on the following formula:

> 1.1% x average of high consecutive recognized earnings in final 10 years x all continuous service [defined to mean contributions during continuous participation in the plan] from date of employment as determined by the company, plus 0.4% x average of high five consecutive recognized earnings in final 10 years x continuous credited service [continuous participation in the plan] after age 25 less a maximum of 50% of Primary Social Security calculated at 1.5% per year of credited service after age 25.

Defendants' exhibit 18 at p. 2.

The guarantee of fixed income places all the investment risk on the insurer, with no substantial risk to the annuitants. *See SEC v. Variable Ann. Ins.*, 359 U.S. 65, 71 (1959). After examining the economic substance of plaintiffs' interest in the pension fund, we conclude that there is no real risk to the capital representing the participants' contributions as to make plaintiffs, in any meaningful sense, "sharer[s] in the investment experience" of the enterprise. *Id.* at 77. A large portion of the fund's income comes from the employer's contributions, "a source in no way dependent on the efforts of the Fund's managers." *Daniel*, 439 U.S. at 562. The "risk" of the possible insolvency of the enterprise and of the soundness of the plan is not an investment risk. The principal barrier to an individual employee's realization of pension benefits is his own ability to meet the fund's vesting requirements rather than the pension fund's investment success. *Id.*

The Colgate-Palmolive employees who participated in the plan were interested in acquiring an insurance-type retirement benefit, rather than making an investment for profit. There was no expectation of "profits" from the investment of their contributions, nor was the amount of benefits tied to the success or failure of the investments of the pension's funds. Plaintiffs' interest in the pension plan does not represent any of the "'countless and variable schemes devised by those who seek the use of money of others on the promise of profits.'... and therefore do not fall within the 'ordinary concept of a security.'" *United Housing Foundation v. Forman*, 421 U.S. 837, 848 (1975), *quoting SEC v. Howey*, 328 U.S. 293, 299 (1946). We conclude that "the type of pension plan at issue in this case bears no resemblance to the kind of financial interests the Securities Acts were designed to regulate."[9] *Daniel*, 439 U.S. at 566.

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[9]Our holding does not foreclose application to pension plans such as the plan at issue in this case of the anti-fraud provisions of state regulations of annuities.

IV

The district court properly granted defendants summary judgment on the claim that the Military Selective Service Act, 50 U.S.C. §459(b), was violated, since plaintiffs did not present evidence sufficient to dispute the company's showing that none of the former servicemen lost pension benefit credits as a result of time spent in the armed services.

The order of the district court is vacated as to the thirty-nine plaintiffs who withdrew from the plan and remanded with directions to dismiss. As to the fourteen plaintiffs who were laid off, the order granting summary judgment is affirmed.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

United States Court of Appeals

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

NOVEMBER 10, 1982

Before

HON. RICHARD D. CUDAHY, *Circuit Judge*
HON. RICHARD A. POSNER, *Circuit Judge*
HON. LUTHER M. SWYGERT, *Senior Circuit Judge*

CLAUDE COWARD, et al., *Plaintiffs-Appellants,*	) Appeal from the) United States) District Court for
No. 81-1305 vs.	) the Southern) District of
COLGATE-PALMOLIVE COMPANY, et al., *Defendants-Appellees.*	) Indiana, New) Albany Division.) No. 77-105-C) James E. Noland,) *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc*, no member of the court having requested a vote on the suggestion for an *en banc* rehearing, and all members of the original panel having voted to deny the petition for rehearing,

IT IS ORDERED that said petition for rehearing be, and the same is hereby DENIED.

Office-Supreme Court, U.S.
FILED
MAR 15 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1454

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CLAUDE COWARD, NORMA FUNKHOUSER, VIOLA GOLDMAN, ANN HUFF, ROSEMARY HYDES, MARY LEE, VERNER BOOTH, BELVA CREECH, GENEVA WELLS, GEORGE HAMBAUGH, CAROLYN FOSTER, LOUIE WIMP, ANDY JOHNSON, RICHARD KERBERG, GEORGE JONES, BERNARD MILLER, JOE HYMAN, CHARLES LYNCH, JAMES REED, ARTHUR SAMPLES, ROBERTA LaPAILLE, MARVIN FUNKHOUSER, BETTY BROCK, MILLS VINCENT, HELEN CARROLL, ROSALIE BURKS, WILLIAM HIGHFILL, DAVE ZOWE, SARA RAPP, KING BLAKELY, RAYMOND KENNEDY, OWEN WOLFE, ELBERT STEVENS, BRADFORD BULLOCK, ERNEST DENSFORD, WILLIAM HESSIG, ELMER KEITH, RALPH MORRISON, VERNIE GOLDMAN, GENEVA WITTINGHILL, JOHN BRUCE, KENNETH SINKHORN, HAROLD BROOKS, ALMA HOUSE, PAULINE HAMBAUGH, VELDA HOUSE and WALTER BLAKELY, - Petitioners

versus

COLGATE-PALMOLIVE COMPANY, EMPLOYEES' RELATIONS COMMITTEE OF COLGATE-PALMOLIVE COMPANY, PLAN ADMINISTRATOR OF THE COLGATE-PALMOLIVE EMPLOYEES' RETIREMENT INCOME PLAN, et al., - - Respondents

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

(See inside cover for list of Attorneys)

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Securities Exchange Act of 1934, 15 U.S.C. §77j(b). 8

Rules:

Supreme Court Rule 21.1(b) 2

CERTIFICATE OF INTEREST

The undersigned, counsel of record for Colgate-Palmolive Company, one of the Respondents herein, furnishes the following in compliance with Supreme Court Rule 28.1:

1. The full name of the corporation represented by the undersigned is:

   COLGATE-PALMOLIVE COMPANY

2. The Colgate-Palmolive Company is a corporation having no parent corporation.

3. The names of all subsidiaries (except wholly owned subsidiaries) and affiliates are:

   Colgate-Palmolive (France)

   Colgate-Palmolive (Morocco)

   Colgate-Palmolive (Tunisia)

   Kendall S.A. (France)

   Colgate-Palmolive G.m.b.h. (Germany)

   Colgate-Palmolive (India) Limited (India)

   Kao-Colgate Oral Products Company, Ltd. (Japan)

   Colgate-Palmolive Egypt S.A.E. (Egypt)

   Colgate-Palmolive del Ecuador S.A. (Ecuador)

   Trebla, A.G. (Switzerland)

   Pozuelo, S.A. (Costa Rica)

   Empressa Agro — Mercantil y de Servicio, Agencia Martinima, S.A. (Guatemala)

   Colgate-Palmolive Cote d'Ivoire, S.A.

   Laboratories Larochette, S.A.

Rice Mills (PVT) LTD. (South Africa)
Fabriafrica (South Africa)

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-1454

CLAUDE COWARD, NORMA FUNKHOUSER, VIOLA GOLDMAN, ANN HUFF, ROSEMARY HYDES, MARY LEE, VERNER BOOTH, BELVA CREECH, GENEVA WELLS, GEORGE HAMBAUGH, CAROLYN FOSTER, LOUIE WIMP, ANDY JOHNSON, RICHARD KERBERG, GEORGE JONES, BERNARD MILLER, JOE HYMAN, CHARLES LYNCH, JAMES REED, ARTHUR SAMPLES, ROBERTA LaPAILLE, MARVIN FUNKHOUSER, BETTY BROCK, MILLS VINCENT, HELEN CARROLL, ROSALIE BURKS, WILLIAM HIGHFILL, DAVE ROWE, SARA RAPP, KING BLAKELY, RAYMOND KENNEDY, OWEN WOLFE, ELBERT STEVENS, BRADFORD BULLOCK, ERNEST DENSFORD, WILLIAM HESSIG, ELMER KEITH, RALPH MORRISON, VERNIE GOLDMAN, GENEVA WITTINGHILL, JOHN BRUCE, KENNETH SINKHORN, HAROLD BROOKS, ALMA HOUSE, PAULINE HAMBAUGH, VELDA HOUSE and WALTER BLAKELY, - *Petitioners*

v.

COLGATE-PALMOLIVE COMPANY, EMPLOYEES' RELATIONS COMMITTEE OF COLGATE-PALMOLIVE COMPANY, PLAN ADMINISTRATOR OF THE COLGATE-PALMOLIVE EMPLOYEES' RETIREMENT INCOME PLAN, et al., - - *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents[1] respectfully request that the Court deny the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

I. STATEMENT OF THE CASE

This is a suit for additional pension benefits which certain petitioners waived by voluntarily withdrawing from the Colgate-Palmolive Employees' Retirement Income Plan ("Plan"), and which the remaining petitioners lost as a result of a layoff which terminated seniority and, therefore, the right to further participate in the Plan. All of these events took place well prior to the effective date of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§1001-1461. The petition in this case presents no issues warranting this Court's review, and none on which the lower courts have disagreed. The petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit therefore should be denied.[2]

From its inception on December 31, 1943, the Plan imposed eligibility requirements as to employees' age

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[1]Notwithstanding Supreme Court Rule 21.1(b), petitioners did not include in the Petition a list of all parties to this proceeding. In addition to the parties listed in the captions, Respondents here consist of John Doe, Vice President of Employee Relations, John Doe, Vice President of Manufacturing, John Doe, Vice President & General Counsel, and Clayton O. McIntyre, Director of Employee Benefit Plans and Policies.

[2]All references to the petition for a writ of certiorari in this case are cited to the page number in the Petition, *e.g.*, Pet. at ...., and references to the Appendix of that Petition are cited as Pet. App. at .....

and years of service for participation. These requirements were changed periodically as a result of collective bargaining negotiations between Colgate and Local 15 of the International Chemical Workers Union, the bargaining agent for certain employees, including petitioners, at Colgate's Jeffersonville, Indiana plant. Effective January 1, 1977, the Plan became non-contributory and Colgate assumed full financial responsibility for contributions to the Plan.

Between 1955 and 1967, 39 petitioners voluntarily withdrew from the Plan and were refunded the amount of their contributions. None of them had vested rights in the Plan prior to withdrawals. All withdrew prior to January 1, 1968, by signing waiver cards.[3] By negotiated amendment to the Plan to be effective January 1, 1968, continuous service for Plan credit purposes was defined to exclude any period of non-participation while eligible and any period prior to withdrawal from the Plan.

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[3]Each of these petitioners signed a waiver card which set forth above their signature the following:

WAIVER CARD Cert. #.....

I HEREBY
CERTIFY THAT: Withdrew from plan at his request on ....., ... to obtain money for payment of debts.

I HAVE BEEN GIVEN AN OPPORTUNITY TO PARTICIPATE IN THE EMPLOYEES CONTRIBUTORY GROUP ANNUITY PLAN WITH THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES. THE BENEFITS OF THE PLAN HAVE BEEN THOROUGHLY EXPLAINED TO ME. I UNDERSTAND FULLY THE BENEFITS AVAILABLE TO ME UNDER THE PLAN AND I DECLINE TO PARTICIPATE.

As the district court found, in every case, before these petitioners withdrew from the Plan, a Colgate official read the waiver card to each of them, explained what they were forfeiting before they signed the cards in his presence, and wrote a note describing each withdrawal which was typed on the back of each waiver card. After withdrawal from the Plan, each of the withdrawing petitioners at various times re-enrolled, but calculation of future pension benefits was based on future service only, in accordance with the terms of the Plan.

The remaining petitioners were discontinued from the Plan when they lost seniority as a result of extended layoffs. These petitioners were refunded the amount of their contributions at the time they lost seniority and therefore, according to the terms of the Plan, were no longer eligible to participate. They claim a restoration of all rights in the Plan prior to their loss of seniority. These petitioners were involved in legal actions which adjudicated their seniority for all purposes.

Each petitioner who lost seniority and was discontinued from the Plan as a result was a participant in either *Stevens, et al.* v. *Colgate-Palmolive Company, et al.*, Civil Action No. NA 72-C-43 (D.C. S.D. Indiana), affirmed by unpublished Order of the Seventh Circuit Court of Appeals on February 17, 1977, and reproduced in the Appendix of this brief, or *Bowe, et al.* v. *Colgate-Palmolive Company, et al.*, 489 F. 2d 896 (7th Cir., 1973).

These two decisions established and finalized the seniority dates of these petitioners which is controlling for Plan benefits. As the district court found:

> "Therefore, this litigation established the seniority dates of each of these 14 plaintiffs. The 7th Circuit Court of Appeals sustained the finding of the District Court that there was no merit to the claim of any of the plaintiffs to seniority and benefits pre-dating their current existing seniority date." (Pet. App. at A-6 and A-7).

II. ARGUMENT

A. There Are No Special Or Important Reasons That Warrant This Court's Review Of Petitioners' First Question.

Petitioners pose their first question as follows: "Whether or not hourly employees who are members of respondent Retirement Income Benefit Plan are entitled to all benefits of the Plan which came into being during the time of their full participation in the Plan which participation was never subsequently interrupted?" (Pet., at 2). The precise issue that petitioners seek to raise through this question ignores the following uncontroverted facts in this case as found by the district court and the Seventh Circuit Court of Appeals:

1. Petitioners have not been continuous members of the Plan since the date they first became eligible to join.

2. As to each petitioner there were periods, after initial participation in the Plan, of non-

participation in the Plan due to voluntary withdrawal or loss of seniority.

3. When each petitioner subsequently re-enrolled in the Plan, such re-entry was on a future service basis only.

4. The seniority and *pension credit entitlement* of those petitioners terminated from Plan participation due to loss of seniority has been adjudicated and finally decided by the Seventh Circuit Court of Appeals in *Bowe* v. *Colgate,* 489 F. 2d 896 (1973) and *Stevens* v. *Colgate,* unpublished Order reproduced in Appendix (February 17, 1977).

Petitioners further ignore the uncontradicted fact that their periods of non-participation in the Plan and periods prior to withdrawal from the Plan have been excluded from the Plan definition of continuous service since January 1, 1968. Under the very definitions of the Plan itself, petitioners' claims are excluded. The improved Plan benefits negotiated subsequent to petitioners' withdrawals, which they now claim, were conditioned upon an employee's having participated in the Plan *continuously* since the date first eligible. Therefore, there can be no issue that, by the very terms of the Plan itself, petitioners were not entitled to the benefits which came into existence subsequent to their respective periods of non-participation.

Petitioners' first question assumes that those who waived their benefit credits by voluntary withdrawal and those who lost their credit as a result of extended

layoff are entitled to retroactive benefit credits based on amendments to the retirement plan which came into effect on January 1, 1977. This specific question and proposed construction were addressed and rejected by the Court of Appeals:

> ". . . , we do not believe that the provisions of the amended plan at issue in this case support such a construction. The plan has always provided that any period prior to withdrawal is not recognized in calculating pension benefit credits. In 1974, amendments to the plan granted retroactive credit to the date of hire *only* to those employees who had been continuous participants in the plan from the date of their eligibility." (Court's emphasis) (Pet. App. A-17).

The previous court decisions involving the petitioners whose seniority loss caused termination from the Plan are *res judicata* as to these petitioners' current claims. The Court of Appeals agreed with the district court, and concluded:

> "On the merits, decisions, in *Bowe* v. *Colgate-Palmolive,* 489 F. 2d 896 (7th Cir., 1973); *Stevens* v. *Colgate-Palmolive,* No. 75-1929 (7th Cir., Feb. 17, 1977, unpublished order), involving the same parties to the claim under review, are *res judicata* as to the issue of the effect of plaintiffs' extended layoffs on their pension benefit credits." (Pet. App. A-16).

Despite petitioners' attempt to distinguish the present claims for pension credits from seniority credits in the earlier cases, the pension credits were

sought as part of the relief in both *Bowe* and *Stevens*. See footnote 5 to Court of Appeals decision. (Pet. App. A-16).

The answer to petitioners' first question about entitlement to improved Plan benefits must be negative. Petitioners simply do not qualify under the terms of the Plan.

B. The Colgate-Palmolive Employees' Retirement Income Plan Is A Defined Benefit Pension Plan, Not A Security Or Investment Contract.

Prior to January 1, 1977, the Plan was funded by contributions from employees and Colgate. Thereafter, the Plan benefits were funded solely by Colgate.

Petitioners' allegations of violations of the Securities Exchange Act of 1933, 15 U.S.C. §77g(a), and the Securities Exchange Act of 1934, 15 U.S.C. §77j(b), were framed in the erroneous belief that the Plan constituted a "security" within the meaning of these Acts.

The district court and the Court of Appeals both rejected this theory. Indeed, the district court scrutinized the facts relating to these allegations and concluded:

> "Clearly there is no fraud in this case in view of the extensive efforts of Colgate through its supervisors to persuade each and every employee to maintain their participation in the Plan rather than exercise an option to withdraw and receive back their cash contributions." (Pet. App. A-7).

Petitioners' reliance upon *International Brotherhood of Teamsters* v. *Daniel*, 493 U. S. 551 (1979) to

support their theory is out of step with the law. The instant case was filed in the district court in October, 1977, right on the heels of the Seventh Circuit decision in *Daniel* v. *International Brotherhood of Teamsters,* 561 F. 2d 1223 (7th Cir., 1977). During the short period of the viability of the Seventh Circuit decision, petitioners adopted the Seventh Circuit's rationale and sued Colgate. In a relatively short span of time, well before entry of summary judgment on January 21, 1981, by the district court, that rationale was rejected by the Supreme Court.

This Court's holding in *Daniel* was that interests in compulsory, noncontributory pension plans providing for defined benefits are not securities. Since January 1, 1977, the Colgate Plan has been a noncontributory, defined benefit pension plan. Prior to that it was a contributory, defined benefit pension plan. The *Daniel* decision fully supports the district court's and Court of Appeals' conclusions that the Colgate Plan *prior* to 1977 was not a "security" as defined by the Securities Acts. There can be no question that since January 1, 1977, the Plan was not a security.

First, under the so-called *Howey* test, (*SEC* v. *W. J. Howey Co.,* 328 U. S. 293, 301 (1946); *United Housing Foundation, Inc.* v. *Forman,* 421 U. S. 837 (1975)), the Court held that noncontributory, compulsory pension plans do not involve "an investment of money in a common enterprise with profits to come solely from the efforts of others", and therefore do not "comport with the commonly held understanding of an investment contract". 493 U. S. at 559.

Second, the Court found that neither the Securities Acts nor their legislative histories evinced an intent to cover pension plans, although pension plans had existed since the statutes' enactment. 493 U. S. at 563-65.

Third, the enactment of ERISA, 29 U.S.C. §1001 *et seq.*, which "deals expressly and in detail with pension plans", further convinced the Court that the Securities Acts did not extend to noncontributory, compulsory pension plans. *Id.* 569-70.

The second and third grounds relied on by the Supreme Court in *Daniel,* relating to the legislative intent of the Securities Acts and to the enactment of ERISA are equally applicable to the Colgate Plan. Congress chose not to have included pension plans in the coverage of the Securities Acts though it might, by plain language, have included them. Moreover, by providing for the close regulation of pension plans through ERISA, Congress acknowledged that "it was filling a regulatory void" in the Securities Acts. *Id.* 570. See also *Marine Bank* v. *Weaver,* 50 U.S.L.W. 4285, 4287 n. 7 (March 8, 1982). ("Since ERISA regulates the substantive terms of pension plans, and also requires certain disclosures, it was unnecessary to subject pension plans to the requirement of the federal securities laws as well".) (dictum).

Petitioners' second question to this Court assumes that, as Plan participants, they had a reasonable expectation of profits derived from the successful investment of Colgate Plan assets. Although the argument may ring true in an abstract sense, it ignores the economic realities of the situation. At least in the case

of a defined benefit plan, such as the Colgate Plan, any profits realized on the investment of Fund assets becomes an indivisible part of the Fund. These profits are not attributed to each participant's "investment" in such a way that an employee's contributions can be said to yield any individual return.

In addition, "the profit element of the *Howey* test is not satisfied when the benefits due a participant upon retirement are not primarily dependent on the success or failure of the trustees' investment efforts to generate asset earnings". *Tanuggi* v. *Grolier, Inc.*, 471 F. Supp. 1209, 1214 (S.D. N.Y. 1979); see also *Daniel*, 493 U. S. at 562. As in *Daniel*, the Colgate Plan counted on employer contributions to make up for any shortfalls in earnings necessary to provide benefits for those eligible to receive them. Under those conditions, any interest a participant might have in profits generated by the Plan are even more tenuous.

The true nature of the Colgate Plan is further illumined by the fact that the amount of pension benefits that participants receive is a function of the level of his compensation and length of service. Nothing in the Plan links the success of its investments to the level of benefits. If anything, the Plan's profits serve merely to reduce the amount that Colgate must contribute to maintain the financial health of the Plan. Thus, any stake that the participants have in the investment success of the Plan is remote at best.

The court in *Tanuggi*, which excluded a shared contribution plan from the Securities Acts, correctly concluded that:

> "[the participating employees'] interest in the Plan is more like an interest in a deferred, fixed annuity than an investment contract. . . . Here, the plan's appeal to the participant is its insurance-like 'stability and security' and not the prospect of growth. . . . The Plan simply receives the employee contributions from the employer and applies them towards a group annuity." 471 F. Supp. at 1215 (Citations omitted).

Moreover, "[t]he risk of loss arising from the failure of the employer to contribute and inadequate investments is a different type of risk than that commonly associated with a security". *Id.*

Colgate's pre-1977 Plan was nothing more than a fixed benefit, group annuity plan in which asset growth, i.e., expectation of receiving benefits in excess of contributions, was entirely contingent upon the fulfillment of vesting requirements and longevity. In this regard, the Colgate Plan has as its appeal an "insurance-like stability and growth", and cannot be equated to a security. It necessarily follows that the Securities laws are not applicable to the Colgate Plan.

III. CONCLUSION

For the reasons stated, Respondents respectfully urge that the instant petition be denied.

Respectfully Submitted,

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I, MATTHEW R. WESTFALL, Attorney for Respondents, and a member of the Bar of the Supreme Court of the United States, hereby certify that on March 14, 1983, I served three copies of the Respondents' Brief In Opposition on the Petitioners by mailing such copies in duly addressed envelopes, first class, postage prepaid, to John O. Moss, Esq., 156 East Market Street, Suite 701, Indianapolis, Indiana 46204. All parties required to be served have been served.

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No. 75-1929

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

CHICAGO, ILLINOIS 60604

Heard October 20, 1976
February 17, 1977

ELBERT STEVENS, et al., - - *Plaintiffs-Appellants,*

v.

COLGATE-PALMOLIVE COMPANY and
INTERNATIONAL CHEMICAL WORKERS,
LOCAL NO. 15, - - - *Defendants-Appellees.*

Appeal from the United States District Court
for the Southern District of Indiana
New Albany Division
No. NA 72-C-43, William E. Steckler, Judge

ORDER

BEFORE: HON. TOM C. CLARK, Associate Justice (Retired)*
HON. LUTHER M. SWYGERT, Circuit Judge
HON. WALTER J. CUMMINGS, Circuit Judge

This lawsuit was filed by nine male employees and a retired male employee of the Colgate-Palmolive Company's plant in Jeffersonville, Indiana. In their class suit under Section 706(f) of the 1964 Civil Rights Act (42 U.S.C. § 2000e-5(f)), they claim that their Union (defendant In-

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*The Honorable Tom C. Clark, Associate Justice (Retired) of the Supreme Court of the United States, is sitting by designation.

ternational Chemical Workers, Local No. 15) and Colgate discriminated against men in that they were not allowed to work on "finishing labor" jobs in Colgate's Toilet Article or Shipping Departments. Their employment with Colgate originated in 1947. They were laid off from early August 1957 to late August 1958, although during that same layoff period women with less plant-wide seniority were retained in such "finishing labor" jobs. As a result of the layoff, under the terms of the collective bargaining agreement with Colgate plaintiffs were divested of their accumulated seniority of ten years. When they returned to work on August 25, 1958, they were rehired as new employees with plant seniority only from that date forward.

After exhausting their administrative remedies before the Equal Employment Opportunity Commission, plaintiffs received right-to-sue letters dated August 1, 1972, and this suit was filed 27 days thereafter. They asked the district court to grant them and their class

> "the accumulated back seniority they have lost, with all benefits, including but not limited to, back pay, increase in renumeration [sic], vacation rights, sick leave and pension rights to which they would have been entitled had they not been wrongfully classified, denied recall or laid off on the basis of sex."

They also asked to be given "seniority in a secondary department equivalent to that accorded females" also working at Colgate's Jeffersonville plant. This means that if they moved from their home department to a new or secondary department, their home department seniority would remain with them.

The present lawsuit resembles a previous lawsuit filed by Colgate's female employees culminating in two opinions of our Court, both entitled *Bowe* v. *Colgate-Palmolive Co.*

Bowe I is reported in 416 F. 2d 711 (7th Cir. 1969), and *Bowe II* in 489 F. 2d 896 (7th Cir. 1973).

Following our decision in *Bowe II*, Colgate and the Union moved the district court to dismiss this complaint on the ground that similar issues had been resolved by this Court against Colgate's female employees, so that the present complaint should be dismissed for failure to state a claim upon which relief can be granted. On January 10, 1975, the district court filed a short opinion refusing to dismiss this complaint on the ground that it might involve a totally different factual situation from *Bowe II*. However, the court concluded, "[i]f the discovery indicates that it would be impossible for the Court to remedy the effects of the 1957 layoff, a motion for summary judgment could then dispose of the action." This prompted the plaintiffs, the Union and Colgate to file motions for summary judgment in March 1975.

On August 12, 1975, the district court handed down another memorandum opinion granting summary judgment to defendants. Judge Steckler decided that the present plaintiffs had merely resurrected an issue that was already resolved in *Bowe II*. He reasoned that any attempt to remedy possible present-day effects of the 1957 layoffs of plaintiffs would necessarily be based on sheer speculation and would be impossible to accomplish in an equitable manner. Consequently, judgment was entered for the defendants. The ten named plaintiffs have appealed from that judgment. We affirm.

Before 1966, the various jobs at Colgate's Jeffersonville plant were designated exclusively for males or exclusively for females, with separate seniority rosters being maintained. This resulted in male employees being laid off at times while female employees with less seniority were retained, and vice versa. When such layoffs lasted more than a year, the laid-off employees lost their accumulated

seniority. In *Bowe I*, certain female employees contended that seniority lost because of such past discriminatory layoffs had to be restored. We agreed with the district court that such relief should only be granted with respect to seniority lost as a result of a layoff which occurred in 1963, for it was "impractical to determine whether any earlier layoffs were discriminatory or to ascertain which employees would currently have more or less seniority if there had been no discrimination." 489 F. 2d at 899. The ten male employees who brought the present suit lost their seniority in a layoff which occurred on August 2, 1957. They wish to have their seniority restored back to their original 1947 dates of hire, even though such relief was denied to female employees in *Bowe II*. As in that case, the defendants are again Colgate and the Union, which is the collective bargaining representative of all these employees.

Title VII of the Civil Rights Act of 1964 prohibiting discrimination based on sex became effective on July 2, 1965. A new collective bargaining agreement complying with that Act eliminated the dual seniority system as of March 1, 1966. The pre-1966 system usually was advantageous to the male employees because they did not have to compete with females for the higher-paying jobs in the plant. However, when reductions in the working force occurred that affected male jobs primarily, the male employees affected could not bump female employees with less seniority. Consequently, male employees were sometimes laid off while junior female employees were retained. Likewise, when a reduction in force primarily affected female jobs, female employees would be laid off while male employees with less seniority were retained. This bifurcated seniority system was the basis of the complaint in *Bowe*.

The plaintiffs in this case raise the same issue as is involved in *Bowe*, namely, whether employees who lose

seniority by being laid off under the prior discriminatory dual system for a period of twelve months or more should have their lost seniority restored. In *Bowe*, the district court resolved this issue as follows:

> "The Court has reviewed this problem in some detail and has concluded that it is simply impossible to determine just what seniority every female employee would have if there had never been a discriminatory seniority system in effect. Moreover, even if such a determination could be made, it is not at all clear that it would necessarily be beneficial to the plaintiffs. Since on some occasions senior male employees were laid off and lost seniority while junior female employees were retained, a complete realignment of seniority for all employees would probably place some female employees in a worse position vis-a-vis male employees than they are in now.
>
> "Accordingly, the Court has decided to adopt the following solution, which appears to be satisfactory to the majority of the plaintiffs. A sizeable number of female employees lost seniority as a result of a layoff which occurred on or before February 22, 1963, and which lasted until February 24, 1964. This was the last layoff prior to the effective date of the Act which resulted in a loss of seniority. The Court will order the restoration of any plant and department seniority lost as a result of this particular layoff, but will not attempt to restore seniority which may have been lost through earlier layoffs or force-outs. It is simply impractical to determine whether such earlier layoffs or force-outs were discriminatory, or to ascertain which employees would have more or less seniority today if there had never been a discriminatory seniority system in effect. The Court believes that the

> solution which it has adopted is fair and equitable to all parties, and is the most practical way of resolving this difficult and complex problem." *Bowe* v. *Colgate-Palmolive Co.*, 6 BNA F.E.P. Cas. 1123, 1125-26 (S.D. Ind., May 7, 1971).

This phase of the district court's order was affirmed in *Bowe II*, 489 F. 2d at 901-902.

It is of course true that even though the dual seniority system has been eliminated, plaintiffs still suffer certain disadvantages as a result of their reduced seniority. Nonetheless, we agree with defendants that for the above reasons given by the district judge in fashioning relief in *Bowe*, plaintiffs should not be granted relief for any losses in seniority occurring prior to 1963.[1] If plaintiffs had their seniority dates changed from August 25, 1958, when they were rehired, to their May and June 1947 original dates of hire, there would be an adverse effect on all other male and female employees whose present seniority dates fall between May 1947 and August 1958. Since female employees laid off unlawfully prior to 1963 did not have their seniority restored for benefit purposes, sex discrimination would be fostered here if this Court were to give plaintiffs a restoration of seniority, even if the relief given would be solely for benefit purposes.

As noted, female employees were laid off while less senior male employees were retained on various occasions. If a non-discriminatory seniority system had been in effect,

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[1]Plaintiffs' reliance on *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405; *Meadows* v. *Ford Motor Co.*, 510 F. 2d 939 (6th Cir. 1975); and *Palmer* v. *General Mills*, Inc., 513 F. 2d 1040 (6th Cir. 1975), is misplaced. They did not involve a complicated employment background comparable to that presented here and in *Bowe*, nor were they confronted with the kind of careful relief formulated for all employees by the district court and approved in *Bowe II*.

plaintiffs might have been laid off permanently or for more than a year, thus losing their seniority on other occasions. The district court properly recognized that it is impossible to determine whether on balance plaintiffs are worse off today as a result of the fact that prior to 1966 the Jeffersonville plant was operated under a dual seniority system. We will not deviate from *Bowe II* by affording plaintiffs the relief they seek here. To do so would inflict an injustice on the female employees and would ignore the salutatory principle of *stare decisis.*

Judgment affrmed.[2]

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[2]Because of the result we have reached, it is unnecessary to consider Colgate's argument that plaintiffs' claims are time-barred. See *Evans* v. *United Air Lines,* 534 F. 2d 1247, 1250-1251 (7th Cir. 1976), certiorari granted, 45 LW 3329.